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No. 88-2098

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

TOWNSHIP OF PARKS,
Petitioner,

v.

BABCOCK & WILCOX COMPANY,
Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

OBJECTIONS AND RESPONSE TO MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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OBJECTIONS AND RESPONSE TO MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. PROCEDURAL BACKGROUND

On June 24, 1989, the Township of Parks (the "Township") filed a Petition for Writ of Certiorari (the "Petition") seeking review of the judgment order (the "Judgment Order") of the United States Court of Appeals for the Third Circuit (the "Third Circuit") in this action. The Judgment Order summarily affirmed the discretionary decision of the United States District Court for the Western District Of Pennsylvania (the "district court") granting Respondent Babcock & Wilcox Company's ("B&W") motion for voluntary dismissal without prejudice pursuant to Fed.R.Civ.P. 41(a)(2) ("Rule 41(a)(2)"). B&W filed its Brief in Opposition to the Petition on July 28, 1989 (the "Opposition Brief").

The Pennsylvania State Association of Township Supervisors ("PSATS") and the National Association of Towns and Townships ("NATaT") (collectively referred to herein as the "Amici") have now filed a motion for leave to file a brief *amici curiae* in support of the Petition. [1] The Amici's arguments in support of their motion, and the arguments contained in the proposed brief itself, are predicated on a series of factual errors and misunderstandings of the proceedings below. B&W does not consent to the filing of the brief *amici curiae*. The Amici's motion should be denied.

II. FACTUAL BACKGROUND

The facts giving rise to the Township's Petition are set forth in B&W's Opposition Brief and need not be repeated at length here. For present purposes, the following summary is sufficient.

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[1] The Commonwealth of Pennsylvania and the State of Kansas have joined in the proposed brief.

On September 16, 1985, the Township enacted Ordinance 9-16-85 (the "Ordinance"). The purpose of the Ordinance was to prohibit the operation of B&W's proposed Volume Reduction Services Facility ("VRSF"). The Ordinance imposes air emission restrictions which are substantially more stringent than federal and state standards and which bear no rational relationship to public health and safety. On December 31, 1985, B&W commenced this action challenging the constitutionality of the Ordinance. See Opposition Brief, at. 1-2.

The Township filed a motion to dismiss the complaint. In denying the motion, the district court held that each of B&W's claims stated a proper cause of action. The Third Circuit subsequently denied the Township's petition for interlocutory appeal. *Id.* at 3.

For the next two and a half years, the Township conducted a relentless campaign to prevent B&W from taking any discovery. Toward this end, the Township filed twenty-three motions and briefs, including various appeals, petitions and applications to the Third Circuit. The district court repeatedly rejected those motions, holding that B&W's discovery efforts were proper. The district court further rejected the Township's claims that B&W's discovery efforts were intended to or did harass the Township. The Third Circuit consistently upheld the district court's decisions. *Id.* at 3-5.

The Township's steadfast refusal to permit B&W to take any meaningful discovery, despite two court orders requiring it to do so, coupled with the Township's practice of filing meritless motions, eventually made this litigation too expensive for B&W to continue. When the Township would not settle this action on reasonable grounds, B&W filed a motion for voluntary dismissal without prejudice pursuant to Rule 41(a)(2). The district court granted that motion, subject to a series of conditions designed to ensure that the Township suffered no legal prejudice from this action. *Id.* at 5-8.

Despite the fact that those conditions prohibit B&W from operating the VRSF forever, despite the fact that those conditions require B&W's current operation to comply with Ordinance's unconstitutional emission standards and despite the fact that those conditions require B&W to pay the Township's costs in the action, the Township, or at least its counsel, wants more. Specifically, the Township filed an appeal with the Third Circuit to obtain a ruling that B&W should be

required to pay the Township counsel's legal fees. The Third Circuit denied the Township's appeal. The Township now seeks certiorari from this Court to obtain a ruling that would require the district court to award the Township's counsel his legal fees that both the district court and the Third Circuit believed were inappropriate.

III. ARGUMENT

The Amici seek to support the Township's Petition on the remarkable grounds that the lower courts' decisions threaten our basic democratic processes. Specifically, they claim that the Third Circuit's ruling was improper because it infringes upon the right to self-government and free speech; violates the principles enunciated in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); and is contrary to various so-called public policies protecting municipalities from lawsuits such as this one. The Amici's arguments do not withstand even casual scrutiny and must be rejected.

First, the Amici's basis for requesting that certoriori be granted is that the district court abused its discretion in granting a voluntary dismissal under Rule 41(a)(2). A claim of abuse of discretion generally does not provide a valid ground for the grant of certoriori. Opposition Brief at 9, 26. This case provides no special justification for granting certoriori to review the claim of abuse.

The fundamental assumption undergirding the Amici's motion is that the Third Circuit's decision increases the threat of unfounded, expensive lawsuits being commenced against other municipalities. That assumption completely ignores the nature of the Third Circuit's ruling. Specifically, the Judgment Order is a one line summary affirmance of an unreported, discretionary decision by the district court. That summary affirmance has limited or no precedential value; it does not purport to apply any new principles under Rule 41(a)(2); it does not even adopt the reasoning of the district court. *Id.* at 10-12. The Judgment Order, thus, does nothing to change the state of the law or increase the risk of bad faith lawsuits against municipalities.

Moreover, the district court's decision was, by its very terms, specifically tailored to the unique facts of this case. Based on its intimate knowledge of those facts, gained through over three years of

deciding countless Township motions and through intensive involvement in the entire settlement process, the court decided that the imposition of attorneys' fees in this case was not necessary or appropriate to protect the Township. The Third Circuit, also very familiar with this case through the Township's repeated, unsuccessful attempts at interlocutory relief, as well as full briefing on this appeal, agreed with that conclusion. Both of the lower courts' decisions were based on well settled Rule 41(a)(2) principles. *Id.* at 12-17. The lower courts' decision not to award attorneys' fees in this context simply has no implications for other municipalities in other situations. Courts remain free to impose proper conditions under Rule 41(a)(2) to prevent legal prejudice to any defendant, not just municipalities, when a plaintiff seeks to dismiss a case voluntarily.

Second, the fundamental factual premise of both the Amici's motion and their brief is that the Township incurred attorneys' fees in excess of $300,000. That premise is not supported by any cite in the record; it is absolutely false. In fact, the Township has paid virtually no attorneys' fees whatsoever in this case. In seeking an extension of time, the Township's counsel admitted to the district court that he was representing the Township on a "pro bono fee basis". Further, in settlement negotiations before the magistrate, the Township's counsel admitted that his fees had been subsidized at least in part by unnamed third parties. *Id.* at 15.[2] Finally, the Township's annual budgets for the years in which the lawsuit was proceeding before the district court reflect no payment, or even allocation for, the payment of attorneys' fees for this action. *Id.* at 14-15.

Third, the Township's repeated claim, echoed by the Amici in their brief, that B&W commenced this lawsuit to "bludgeon" the Township through a groundless lawsuit is unsupported in the record and, in fact, has repeatedly been rejected by the lower courts. In

[2]Despite being repeatedly asked, the Township's counsel would not tell the district court how much he had actually been paid by the Township; instead, the Township's counsel kept saying that the "value" of his services was in excess of $200,000. When the district court magistrate finally insisted during oral argument on the Township's objections to B&W's motion for voluntary dismissal that the Township's counsel reveal how much the Township had actually paid him, he admitted that it was only $10,000. The Township never produced any evidence to prove that even this amount was paid to the Township's counsel.

rejecting the Township's motion to dismiss, the district court held that each of B&W's causes of action stated a proper claim.[3] The Third Circuit refused to grant the Township an interlocutory appeal on its motion. Further, the district court repeatedly held that B&W's discovery sought information relevant to its claims and did not harass the Township. *Id.* at 4.

Similarly, the Amici's absurd claim that B&W controlled this litigation and "incurred only the expenses that it chose to incur" is completely refuted by the record. The principal affirmative actions that B&W took in this case were to file the complaint, to serve 4 subpoenas *duces tecum* and to attempt to take 4 depositions specifically authorized by the district court. In response to those three actions, the Township filed a motion to dismiss, twenty-three motions, briefs and appeals opposing B&W's discovery, a number of meritless motions for summary judgment, a series of improper discovery requests and various unfounded motions for sanctions which were ultimately dismissed by the court. Even a cursory review of the record proves beyond doubt that this litigation was controlled not by B&W, but by the Township counsel's unrelenting actions to obstruct this action. Moreover, the notion that B&W "chose to incur" the huge expenses necessary to respond to the Township's improper actions, particularly when it knew that the Township was paying nothing to its own counsel for generating these costs, is ludicrous.

Fifth, the Amici's contention that the attorneys' fees which the Township theoretically (but not actually) incurred in this case are somehow comparable to the compensatory damages at issue in the various sovereign immunity cases cited by the Amici or the punitive damages at issue in *City of Newport v. Fact Concerts, Inc.*, 436 U.S. 658 (1979), is unsupportable. Although the Amici apparently hope that the Court will lose sight of the ball, the fact is that this case does not involve the Township's payment of any type of damages whatsoever. The only expenses at issue in this case are attorneys' fees that the Township has never incurred or paid.

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[3]The district court maintained its opinion that B&W's complaint properly stated cognizable causes of action throughout the litigation. In ruling on the motion for voluntary dismissal, the court stated that "it cannot be reasonably argued that the plaintiff's action was totalling lacking in merit." *See* Appendix filed by the Township with its Petition at A12.

Further, the Amici's argument ignores the Court's holding in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). In *Monell*, the Court decided that a private party who had been deprived of his civil rights by a municipality in violation of 42 U.S.C. 1983 may sue that municipality for compensatory damages. Holding that a municipality may be sued necessarily requires the additional conclusion that the municipality may be forced to incur attorneys' fees to defend itself. The Court's decision in *City of Newport* that a municipality may not be sued for punitive damages certainly does not suggest otherwise. The courts have never considered litigation expenses as tantamount to punitive damages. The Court should decline the Amici's invitation to overturn two hundred years of case law to adopt this novel concept.

Sixth, the Amici's fundamental premise that the Third Circuit's one sentence Judgment Order threatens the principles of self-government, free speech and democracy as we know it is patently absurd. The Third Circuit has decided that the district court did not abuse its discretion in permitting the voluntary dismissal of this action without prejudice. That dismissal was made subject to a number of conditions which the district court concluded would protect the Township from legal prejudice. The Third Court, upon a careful review of the facts relied upon by the district court, found that judgment to be proper. Rule 41(a)(2) does not demand the imposition of attorneys' fees; the lower courts determined that they were not necessary in this case to protect the Township. Although the Amici, who were not parties to this action, may not agree with that decision, that disagreement does not provide a basis for the grant of certiorari.

Seventh, even assuming that the possibility of groundless suits by large corporations posed some threat to the treasuries of municipal governments, the remedy for that problem is already available in Fed.R.Civ.P. 11, and the courts' discretionary powers under Rule 41(a)(2). This Court need not grant certiorari in this case to prevent such abuses. Indeed, there is no support in the record that this action was brought for improper purposes or that the Township was unable or even hampered in its ability to defend this case.

Finally, the Amici's incantations to fundamental political principles notwithstanding, the record establishes that the Township's

Petition has nothing to do with the right to self-governance, free speech or the effective conduct of local government. It has nothing to do with compensatory or punitive damages. In fact, the Petition really does not have much to do with the Township itself. The only purpose of the Petition is to provide a vehicle for the Township's counsel to obtain attorneys' fees from B&W that the Township was not required to pay him. The lower courts felt that attorneys' fees were inappropriate. Nothing in the Amici's motion or brief provides any persuasive reason that those decisions were wrong. The Amici's motion should be denied and its brief rejected.

Respectfully submitted,

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